WAIVER OF COUNSEL IN STATE NON-CAPITAL CRIMINAL TRIALS

Moore v. Michigan, 355 U.S. 155 (1957)

This case illustrates the thoroughness with which a trial judge must approach the problem of insuring to every criminal defendant his constitutional right to counsel, and the burden which the court must meet in order to insure that the defendant's waiver of counsel will not, years later, be grounds for a new trial.

Petitioner, a seventeen year old Negro with only a seventh grade education, was arrested for the murder of an elderly lady. While in custody, and before arraignment, the sheriff had led Moore to believe he was in danger of mob violence and had encouraged him to confess if, in fact, he was guilty. This was corroborated by the sheriff's testimony before the Michigan court which heard the motion for a new trial.

At the arraignment the trial judge asked petitioner whether he had a lawyer or desired to have one. Petitioner replied that he neither had, nor desired to have a lawyer, but that he merely wanted to get the matter over with as speedily as possible. Before accepting a plea of guilty the judge conferred with the petitioner who talked freely of the crime but complained that there was "something wrong with my head." Observing that petitioner had previously been in trouble with the law for breaking and entering, and unlawfully taking automobiles, the judge found petitioner guilty of murder in the first degree and sentenced him to life imprisonment—the maximum penalty for murder in Michigan.

Eleven years later petitioner commenced this action in the state courts as a delayed motion for a new trial upon the ground that his conviction was invalid because he had lacked the assistance of counsel at the time of his plea and sentence. The state courts denied relief.[1] The Supreme Court of the United States, splitting five to four, reversed. The determining question was whether there had been an effective waiver of the right to counsel. The majority stressed the fact that counsel could have taken advantage of defenses that were suggested by the facts (*i.e.*, insanity, the fact that the evidence against Moore was purely circumstantial), and that the waiver appeared not to be freely given. The dissent stressed the time lapse (nineteen years by the time the case reached the Supreme Court), and that the results of the conference with the trial judge indicated that the waiver was freely made.

It is well established that a defendant in a capital or non-capital criminal trial is denied due process of law under the fourteenth amend-

[1] People v. Moore, 344 Mich. 137, 73 N.E.2d 274 (1955).

ment[2] when he is denied counsel and is thereby prevented from making a fair defense.[3] The case of *Betts v. Brady*,[4] however, held that a person accused of robbery was not, as a matter of right, entitled to court appointed counsel although he requested such appointment and could not afford to hire counsel. In spite of the fact that the trend is now toward finding that special circumstances exist which require the appointment of counsel, this determination must be made in the light of the facts of each case.[5]

It is to be noted that the right to counsel in the state courts is not coextensive with the right to counsel in the federal courts. The sixth amendment[6] was held in *Betts v. Brady*[7] to be inapplicable to the states. This position was reaffirmed by the case of *Gallegos v. Nebraska*.[8] Denial of counsel is not a violation of the United States Constitution unless the absence of counsel results in a denial to the accused of the essentials of justice.

Although the circumstances are such that the accused would be guaranteed counsel by the Constitution, this right can be waived.[9] The waiver, however, can only be made by an accused who has an understanding of his rights. In *Uveges v. Pennsylvania*,[10] a seventeen-year-old defendant pleaded guilty to burglary and was sentenced to serve twenty to eighty years in prison. At the time he entered his plea he was neither offered counsel nor informed of his right to counsel. It was held that he was entitled to the assistance of counsel and that he had not waived this right. The waiver of right to counsel will not be presumed.[11]

As indicated above, a plea of guilty does not necessarily indicate a waiver of right to counsel,[12] but it may be an important factor in the court's consideration. The Supreme Court of Michigan in *People v.*

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[2] U.S. CONST. amend. XIV, §1. No state may ". . . deprive any person of life, liberty, or property, without due process of law. . . ."

[3] Chandler v. Fretag, 348 U.S. 3 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Bute v. Illinois, 333 U.S. 640 (1948).

[4] 316 U.S. 455 (1941). The cases cited *supra* note 3 indicate that this case has been sharply distinguished.

[5] See, *e.g.*, Bute v. Illinois, *supra* note 3, where the court recognized the special circumstances rule but held that it was not applicable to the facts of the case.

[6] U.S. CONST. amend VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[7] *Supra* note 4.

[8] 342 U.S. 55 (1951).

[9] Carter v. Illinois, 329 U.S. 173 (1946). In this case the waiver was express. The judge, however, did appoint counsel to assist the accused during sentencing.

[10] *Supra* note 3.

[11] Annot., 149 A.L.R. 1403 (1944).

[12] *Ibid.*

Crandell,[13] held that a fifteen-year-old defendant who had been sentenced to life for murder did not, after pleading guilty without advice of counsel, have a right to have counsel appointed. *In re Burson*[14] held that a plea of guilty raises a presumption of waiver of right to counsel. The United States Supreme Court has held[15] that an adult defendant who pleaded guilty to murder and who was not offered counsel nor informed of his right to counsel was not denied a constitutional right. The Court went on to say that there could be no violation of such right unless the deprivation of counsel operated unfairly to deprive defendant of his freedom. In *Foster v. Illinois*,[16] the defendant pleaded guilty without being informed of his right to counsel, but the trial judge did inform him of the consequences of his plea. It was held that there was no denial of a constitutional right. Where the error of the court in denying assistance of counsel in making the plea could have been brought to the court's attention by counsel who represented the defendant at a later stage in the trial and was not, it has been held that the question could not be thereafter raised by habeas corpus.[17] However, in *House v. Mayo*,[18] the Court held that the refusal of the trial judge to permit the accused to confer with his counsel prior to entering his plea was a denial of due process.

In addition to presence or absence of a guilty plea, there are several other factors relevant to the determination of whether there has been a waiver of the right to counsel. It is, generally, a combination of factors that is decisive in the particular case.

It is more likely that no waiver will be found if the accused was under an incapacity, *e.g.*, insanity[19] or minority.[20] It will be noted that Moore was a minor and that it was suggested that he may have had a mental defect. Circumstances bearing upon the likelihood of the accused

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[13] 270 Mich. 124, 258 N.W. 224 (1935).

[14] 152 Ohio St. 375, 89 N.E.2d 651 (1949).

[15] Quicksall v. Michigan, 339 U.S. 660 (1950). In contrast to the principal case the accused in *Quicksall, supra,* was not informed of his rights to counsel. In the principal case, however, unlike the *Quicksall* case, *supra,* the accused was a young, uneducated boy, who was prejudiced by lack of counsel.

[16] 332 U.S. 134 (1947).

[17] Canizio v. N.Y., 327 U.S. 82 (1946).

[18] 324 U.S. 42 (1945).

[19] Massey v. Moore, 348 U.S. 105 (1954), where the Court said, "We cannot hold an insane man tried without counsel to the requirement of tendering the issue of his insanity at the trial." The problem is the same when the accused is uneducated. This accounts, in part, for the fact that a lapse of time is not likely to be a bar to review even though witnesses have died in the interim. A possible defense of insanity was also, to some extent, responsible for a reversal in Palmer v. Ashe, *supra* note 3.

[20] It is especially to be noted that in the case of De Meerleer v. Michigan, 329 U.S. 663 (1947), relied upon by the majority, the defendant was a youth of seventeen, while the defendant in the case of Quicksall v. Michigan, *supra* note 15, was an adult in his forties.

being aware of his rights, *e.g.*, prior criminal record[21] or education,[22] will be considered by the courts. In the principal case Moore had received very little education, indicating the probability of a lack of intelligent waiver. This is, however, partially offset by the fact that he had previously been in trouble with the law indicating that the waiver may have been intelligent in spite of the other factors.

The fact that the accused was not informed of his right to counsel is generally very important,[23] but, of course, petitioner was informed of this right. At times, the mere failure of the accused to request counsel will be held to amount to a waiver of counsel.[24] If an accused who goes to trial without counsel has been the victim of mistake on the part of the court or unfair tactics on the part of public officials and these tactics could have been prevented by the appointment of counsel, such factors are likely to lead to a new trial.[25] The only tactic of this nature in the present case was the suggestion of coercion by the sheriff.

An inept defense on the part of a defendant who is without counsel will often lead the reviewing court to hold that there has been an unconstitutional denial of counsel.[26] Petitioner in the instant case

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[21] Gryger v. Burke, 334 U.S. 728 (1948) (fourth offender); *In re* Burson, *supra* note 14 (second offender). *Contra,* Herman v. Claudy, 350 U.S. 116, 122 (1956). The court said: "We cannot agree with the Pennsylvania Superior Court that the mere fact that petitioner had, without the benefit of counsel, pleaded guilty to an offense two years before showed that he had the capacity to defend himself against the thirty charges here."

[22] See Herman v. Claudy, *supra* note 21, where the petitioner had only six years of schooling; *accord,* Smith v. O'Grady, 312 U.S. 329 (1941).

[23] Herman v. Claudy, *supra* note 21; Bute v. Illinois, *supra* note 3; De Meerleer v. Michigan, *supra* note 20; Rice v. Olson, 324 U.S. 786 (1945). *But see* Quicksall v. Michigan, *supra* note 15, where a conviction was sustained in spite of this.

[24] In Quicksall v. Michigan, *supra* note 15, this factor was relevant in denying petitioner's petition, but in Gibbs v. Burke, 337 U.S. 773 (1949), and Rice v. Olson, *supra* note 23, this factor did not prevent a decision in favor of the petitioner.

[25] Townsend v. Burke, *supra* note 3. The accused who was without counsel, was denied due process when the court based its sentence upon misinformation. In Smith v. O'Grady, *supra* note 22, conviction was rendered void because the petitioner was told that he was pleading guilty to one offense, when in fact he was pleading guilty to a more serious offense. In Brook v. Ohio, 17 Ohio App. 510 (1923), the court reached a similar result because the judge had thought that the accused was waiving counsel, but, in reality, he only intended to indicate that he could not afford to hire his own counsel.

[26] Gibbs v. Burke, *supra* note 24, where the defendant's failure to object to hearsay, among other things, indicated that he was incapable of adequately representing himself; Wade v. Mayo, 334 U.S. 672 (1948), where request of accused for counsel had been refused, and he conducted his own defense. It was held that the accused was one of those persons incapable of representing themselves adequately in a prosecution of a relatively simple nature. In Stephenson v. State, 4 Ohio App. 128 (1915), appointed counsel refused to act and the

made no defense at all, although a defense appears to have been possible, at least in mitigating the degree of the crime.

A state statute requiring the appointment of counsel will not prevent the Supreme Court from reviewing the question of denial of counsel under the fourteenth amendment even though the state courts held that the state statute was not violated.[27] Compounding the difficulty in obtaining a conviction that will be final is the doctrine that counsel cannot be forced upon a defendant.[28]

Lapse of time is not a bar to a remedy where the denial of counsel rendered a petitioner's conviction incompatible with due process.[29] When this time lapse is long—more than eleven years in the principal case—it becomes difficult to prove that the accused was not prejudiced by lack of counsel. This difficulty is compensated in part by putting the burden of proving that the conviction violated due process upon the person attacking that conviction.[30]

What are the courts and the prosecuting officials to do to insure that a conviction cannot be successfully attacked collaterally where the defendant has waived this right to counsel? It must be clearly shown that the defendant was competent at the time of the trial, that he was informed of his constitutional rights, that he was aware of the consequences of his action and of the implications of the pending action. Furthermore, during the course of the trial, the court and the prosecuting officials must not take unfair advantage of the fact that the defendant lacks counsel. Most important, it must appear that the steps just mentioned appear in the record.

Lloyd Moore

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defendant conducted his own defense, but so inadequately that it was held that this amounted to no defense at all.

[27] Williams v. Kaiser, 323 U.S. 471 (1945).

[28] See Adams v. United States *ex rel* McCann, 317 U.S. 269 (1942), case involving the sixth amendment; *accord,* Bute v. Illinois, *supra* note 3; Carter v. Illinois, *supra* note 9.

[29] Palmer v. Ashe, *supra* note 3. See also Annot., 96 L. Ed 161 (1951).

[30] Bute v. Illinois, *supra* note 3, in which the Court said, "doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the state attorney." And also, Foster v. Illinois, *supra* note 16, where it was held: "In every case in which . . . due process . . . was found wanting, the prisoner sustained the burden or was prepared to prove but was denied the opportunity of proving, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in confinement." *But see* Williams v. Kaiser, *supra* note 27, where the Court said if defendant requested counsel, it would be presumed that he lacked funds to employ counsel; Johnson v. Zerbst, 304 U.S. 458 (1938), a case construing the right to counsel under the sixth amendment where the Court said: "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. . . ."